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MISCELLANEOUS NOTES.

THE *Law Book News*, of St. Paul, announces its suspension with the December number. We read it regularly during its two years of existence, and shall part with it with sincere regret. We have heretofore taken occasion to speak of it in terms of commendation.

DE FACTO JUDGE.—*Validity of Judgment.* In the case of *McDowell v. United States* (Nov. 18, 1895), the Supreme Court of the United States holds that the judgments of a *de facto* judge, acting under color of authority, by virtue of an appointment valid on its face, cannot be questioned by third persons. Upon this subject, Mr. Justice Brewer, delivering the opinion of the court, said:

"Judge Seymour must be held to have been a judge *de facto*, if not a judge *de jure*, and his actions as such, so far as they affect third persons, are not open to question. *Ball v. United States*, 140 U. S. 118, 129; *Norton v. Shelby County*, 118 U. S. 425; *Hunter v. Ferguson*, 13 Kan. 462. The time and place of a regular term of the district court were fixed by law at Greenville, on the first Monday in February. Judge Seymour was a judge of the United States District Court, having all the powers attached to such office. He appeared at the time and place fixed by law for the regular term, and actually held that term. The circuit judge had, generally speaking, the power of designating the judge of some other district to do the work of the district judge in this district. The order of designation was regular in form, and there was nothing on its face to suggest that there was any vacancy in the office of district judge for the district of South Carolina. Any defect in the order, if defect there was, is shown only by matters *dehors* the record. While this may not be conclusive, it strongly sustains the contention of the government that Judge Seymour was, while holding that term, at least a judge *de facto*. Whatever doubt there may be as to the power of designation attaching in this particular emergency, the fact is that Judge Seymour was acting by virtue of an appointment regular on its face, and the rule is well settled that where there is an office to be filled, and one acting under color of authority fills the office and

discharges its duties, his actions are those of an officer *de facto* and binding upon the public."

The subject is fully discussed, and the same view taken, in *Griffin v. Cunningham*, 20 Gratt. 31, 43–49, and in *McCraw v. Williams*, 33 Gratt. 510. See also 1 Black on Judgments, 175.

APPELLATE COURT—MOOT QUESTIONS.—*Effect of expiration of right in controversy before appeal tried.* It seems to be well settled that when by reason of matters arising subsequent to an appeal and *dehors* the record, it is impossible for the court to grant the relief sought, the appeal will be dismissed; and extrinsic testimony may be introduced to establish the facts relied on to sustain the motion to dismiss. Thus in *Flanagan v. Central Lunatic Asylum*, 79 Va. 554, it was held that where pending an appeal involving the question of appellant's right to a certain office, the office is declared vacant by act of the Legislature, and the governor under due authority has appointed another incumbent, the appeal will be dismissed. The case of *Mills v. Green*, recently decided by the United States Supreme Court (Nov. 25, 1895), affords an excellent illustration of the rule. The original controversy was over the right of the plaintiff to vote at a certain election. Before the appeal was entered in the Supreme Court, the day for the election had passed. We reproduce the following extract from the opinion of Mr. Justice Gray:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of the lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord v. Veazie*, 49 U. S., 8 How., 251; *California v. San Pablo & T. R. Co.*, 149 U. S. 308.

"If a defendant, indeed, after notice of the filing of a bill in equity for an injunction to restrain the building of a house or of a railroad or of any other structure, persists in completing the building, the court nevertheless is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant to undo what he has wrongfully done since that time, or to answer in damages. *Tucker v. Howard*, 128 Mass. 361, 363, and cases cited; *Atty.-Gen. v. Great Northern R. Co.*, 4 De G. & S. 75, 94; *Terhune v. Midland R. Co.*, 36 N. J. Eq. 318, 38 N. J. Eq. 423; *Platteville v. Galena & S. W. R. Co.*, 43 Wis. 493.

"But if the intervening event is owing, either to the plaintiff's own act, or to a power beyond the control of either party, the court will stay its hand.

"For example, appeals have been dismissed by this court when the plaintiff had executed a release of his right to appeal (*Elwell v. Fosdick*, 134 U. S. 500); or when the rights of both parties had come under the control of the same persons (*Lord v. Veazie*, 49 U. S. 251; *Chamberlain v. Cleveland*, 66 U. S., 1 Black,

419; *American Wood Paper Co. v. Heft*, 75 U. S., 8 Wall., 333; *East Tennessee, V. & G. R. Co. v. Southern Teleg. Co.*, 125 U. S. 695; *South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co.*, 145 U. S. 300); or when the matter has been compromised and settled between the parties (*Dakota County v. Glidden*, 113 U. S. 222); or when pending a suit concerning the validity of the assessment of a tax, the tax was paid (*San Mateo County v. Southern P. R. Co.*, 116 U. S. 138; *Little v. Bowers*, 134 U. S. 547; *Singer Mfg. Co. v. Wright*, 141 U. S. 696); or the amount of the tax was tendered, and deposited in a bank, which by statute had the same effect as actual payment and receipt of the money. *California v. San Pablo & T. R. Co.*, 149 U. S. 308.

"Where appeals were taken from a decree of foreclosure and sale, and also from decrees made in execution of that decree, and the principal decree was reversed, it was held that the later appeals having been annulled by operation of law, their subject-matter was withdrawn, and they must be dismissed for lack of anything on which they could operate. *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 48.

"Where, pending an appeal from a decree dismissing a bill to restrain a sale of property of the plaintiff under assessments for street improvements and to cancel tax lien certificates, the assessments and certificates were quashed and annulled by a judgment in another suit, the appeal was dismissed, without cost to either party. *Washington Market Co. v. District of Columbia*, 137 U. S. 62.

"Where, pending a writ of error in an action which did not survive by law, the plaintiff died, the writ of error was abated. *Martin v. Baltimore & O. R. Co.*, 151 U. S. 673."

It is well enough to observe that in the Virginia case cited, the court apparently required the appellant to pay the costs—on the ground that he had slept upon his rights. In the case of *Mills v. Green*, the dismissal was without costs to either party.

EFFECT OF FOREIGN JUDGMENT.—In *Hilton v. Guyot*, the opinions in which have just been published, the Supreme Court of the United States, true to its traditions, is again divided upon a great question of public law. This time it is the effect to be given in the Federal Courts to the judgments *in personam* of the courts of foreign countries against citizens of this country. The judgment in question was that of a French court. The defendant had appeared and the case had been tried on its merits. The controversy involved a large sum, and the question being of first impression in the Supreme Court, the learned judges wrestled with it with all their might, and after the exhaustive and learned manner characteristic of the court. The case was first argued in January, 1894, and was reargued in the following April—the decision being withheld until June, 1895. The Chief Justice with Justices Harlan, Brewer and Jackson dissented. The majority opinion by Mr. Justice Gray will cover more than seventy pages of the official report. It cites, by actual count, one hundred and eighty cases and twenty-one text-writers. The laws governing the subject in England, France, Germany, Russia, Austria, Italy, Spain, Portugal, Belgium, Holland, Denmark, Norway, Switzerland, Poland, Roumania, Bulgaria, Greece, Egypt, Mexico, Brazil, Argentine Republic, Chili, Peru, Cuba, Porto Rico, with Hayti and Monaco bravely bringing up the rear, are noticed severally and in detail. Let us hope that the omis-

sion of Venezuela, Hawaii and the Transvaal may not lead to diplomatic complications.

The conclusions of the court are expressed in the following extracts from the majority opinion:

"In view of all the authorities upon the subject and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that where there has been opportunity for a full and fair trial abroad, before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, *or any other special reason why the comity of this nation should not allow it full effect*, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants therefore cannot be permitted upon the general ground to contest the validity or the effect of the judgment sued on."

Under the saving clause, which we have italicized above, a special reason was found why this particular judgment should not be held conclusive—and that was, the want of reciprocity on the part of the French courts with respect to the judgments of our courts:

"There is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries. * * * By the law of France, settled by a series of uniform decisions of the court of cassation, the highest judicial tribunal, for more than half a century, no foreign judgment can be rendered executory in France without a review of the judgments *au fond*—to the bottom,—including the whole merits of the cause of action on which the judgment rests. * * * The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country by the laws of which our judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim.

"In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive."

In *Ritchie v. McMullen*, decided the same day, the court held that a Canadian judgment, in the absence of allegations of fraud in its procurement or other special ground, was conclusive in our courts.